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SUPREME COURT, U.S.
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IN THE

Supreme Court of the United States

October Term, 1972

No. 72-643

FRANK RAPPA,

Petitioner,

—v.—

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Petitioner, Frank Rappa, prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit, entered in this case on September 26, 1972 (Appendix A hereto, infra, p. 1a).

Statement of No Opinion

No opinion was rendered in this case by the District Court or by the United States Court of Appeals for the Second Circuit.

Jurisdiction

The judgment of the Court of Appeals was entered on September 26, 1972 (Appendix A hereto, infra, p. 1a).

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

Questions Presented

Where a defendant is charged with the importation of heroin and with a conspiracy to import and distribute heroin, and the Government's proof against him is that he was seen to associate with members of the conspiracy and that he was seen to drive a co-conspirator's car:

1) Is such circumstantial evidence sufficient to establish membership in some type of a criminal conspiracy?

2) Is such association, without any additional proof of knowledge, on the part of the defendant, sufficient to establish that the defendant was engaged in a *narcotics* conspiracy?

3) Was the defendant entitled to have the jury charged that: "Where there are two inferences that can be drawn, one of innocence and one of guilt, the one of innocence should prevail?"

Constitutional and Statutory Provisions Involved

1. This case involves the due process clause of the Fifth Amendment of the United States Constitution.

2. The following are the pertinent parts of the relevant statutes under which the defendant was convicted:

> *"21 U.S.C. § 841. Prohibited Acts*
>
> *A—Unlawful Acts*
>
> "(a) Except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally—
>
> "(1) To manufacture, distribute or dispense or possess with intent to manufacture, distribute or dispense a controlled substance;
>
> * * *"

"21 U.S.C. § 846. Attempt and Conspiracy

"Any person who attempts or conspires to commit any offense defined in this subchapter is punishable by imprisonment or fine or both which may not exceed the maximum punishment prescribed for the offense, the commission of which was the object of the attempt or conspiracy."

"21 U.S.C. § 960. Prohibited Acts

A—Unlawful Acts

"(a) Any person who—

"(1) Contrary to section 952, 953 or 957 of this title, knowingly or intentionally imports or exports a controlled substance,

* * *

"shall be punished as provided in subsection (b) of this section. * * *"

Statement of the Case

1. Introduction

Upon this petition, petitioner claims that the circumstantial evidence against him was insufficent to warrant a conviction. The nature of this issue is such that a fairly detailed statement of the facts is required.

Moreover, petitioner submits that, in view of the inflamatory nature of the charges against him and the dramatic investigative efforts on the part of the Government, trial court's charge improperly permitted the jury to give full vent to its speculative faculties in arriving at a guilty verdict.

The dramatic flavor of the case is reminiscent of a recent novel. The Government's proof at trial included evidence about: a Ford automobile that went on a cruise to Italy and returned with 82 kilos of heroin secreted behind its upholstery; a Frenchman who, after a string

of self-admitted, but unrelated successes, failed to make his connection; a score of United States customs agents who assumed undercover roles in an intense attempt to surveille the anticipated connection and memorialize it on film; and three United States residents, originally from the same town in Sicily, who, during these events, lived in Queens, New York. The latter three were the defendants named in the indictment. The plot depicted at trial took on added color through reference to the alleged involvement of mysterious French heroin brokers, and of meetings in such places as Lyon, France.

In so describing the circumstances of this case, it is not our intent to minimize the seriousness of the subject matter. 82 kilos of heroin would have gone far in doing its deathly work, and, according to the trial testimony, would have grossed $820,000 for the wholesalers. Our point is that the facts of this case—the elements of intrique, surveillance and distasteful crime—easily lent themselves to a mesmerization of the jury and to a distraction of the jury away from the standards of proof which should obtain in criminal trials.

Within the restrictions imposed by the limitations placed upon them, the agents involved did a masterful job in uncovering the basic plot and in steering the known and apparent participants into situations which would maximize the opportunities for surveillance. The heroin *was* found and certain of the malefactors *were* induced to confess their participation. However, it is our submission that no meaningful proof existed to show that the petitioner knowingly participated in any transactions involving heroin, and that the very device utilized by the agents to penetrate the plot drastically weakened the probity of what little evidence existed. As will be more fully noted below, the determination by the agents to release Giacomazzo, a conspirator who was caught in the act, so as to trap further alleged conspirators with Giacomazzo's cooperation, laid the matter open to the high possibility

that Giacomazzo would "set up" an innocent person for the purpose of taking the heat away from himself and away from his true principals. With these thoughts in mind, we shall examine the Government's trial proof.

2. The French Phase

On September 21, 1971, a Frenchman by the name of Richard Berdin arrived at John F. Kennedy airport from Canada. In his summation to the jury, the prosecutor summarized the effect which Berdin's anticipated coming had upon the United States Bureau of Narcotics:

> "On the 21st, Berdin arrived in New York City. On cross-examination of Berdin by Mr. Gilbert, we find out that it's not his first time here. He has been here twice before and he had many charges pending against him here. Obviously, the agents knew about Berdin; they knew he was coming, they knew he was coming and for what—heroin.
>
> "Meanwhile, on the 22nd, after Berdin arrives, agents and many agents are at the pier searching cars; not just looking in the trunk, not just looking inside the car, but more, because Berdin arrived; they knew narcotics was coming in, just because he arrived, just because he was here.
>
> "Where did they look? One ship that comes in on the 22nd" (A. 853-854).

When Berdin arrived, Federal agents skillfully steered him to a special taxi cab driven by an agent. Thus, he was thereafter continuously under surveillance which included motion picture recordation of his activities (A. 132-135, 304). Ultimately, he was arrested, became a government witness, and provided the following version of the events which led to his arrival in New York.

On about September 17, 1971, Berdin met with two persons named Grisoni and Lajoux at a restaurant in

Paris. Berdin purported to have contacts in the United States which would enable him to dispose of substantial quantities of drugs, and he agreed to act as a distributor for his companions.

On the following day, at their direction, he went to Lyon, France, and met them at a bar there. They introduced him to a person described as a grey-haired Frenchman, who appears to have been in charge of the operation, and who sealed the bargain with Berdin. He was told that the transportation of the heroin would be by means of secretion in a car and that the load would amount to 94½ kilos. Thereafter, he was introduced to a fourth man, not otherwise identified, who was given the code name "Michel". The plan was that Michel would separately go to the United States, would be in front of the Air France airline office on Fifth Avenue in New York at specified hours of each day, and would be Berdin's contact for the receipt of the heroin. The first such meeting was set for September 21, 1971 (A. 639-647).

As it turned out, Berdin appears to have arrived in New York later on the day of September 21st than anticipated. For that reason he did not meet his contact on that day (A. 651).

3. The Events of September 22, 1971

At 10 A.M. on September 22nd, while under surveillance by the agents, Berdin met Michel in front of the Air France office. He asked if everything was going properly, and Michel responded that he did not know yet. They took a taxi, and Michel told him that the heroin would be in a beige Ford with license plate number 3T-289, located on Astoria Boulevard between 33rd and 34th Streets. He gave Berdin the key to the car, noting that the car's registration certificate would be in the glove compartment. Several efforts by Michel to reach a "contact" by telephone were unsuccessful, apparently due to the fact that

Michel did not have the correct telephone number. During the course of this process, Berdin learned that the person who was to be reached at the other end of the line was referred to as "Lorenzo" (which happens to be the first name of appellant's co-defendant D'Aloisio) (A. 651-654).

At 10:45 A.M. of this same day, while Berdin was engaging in the above activities, a United States customs patrol officer on duty at Pier 90 in Manhattan, searched a 1970 Ford automobile (license number 3T-289) which had been unloaded from the S.S. Raffaelo. He found a bag of white powder secreted within the door of the car. Other agents were summoned and a chemical test was performed at the scene, which revealed that the substance was heroin (A. 91-95). It was learned that the automobile was owned by a passenger aboard the ship, Giuseppe Giacomazzo, who was travelling as man and wife with Corrine Giaquinto. After the discovery, when the unsuspecting couple were observed walking over to the car, they were arrested (A. 94-95).*

The car and the suspects were taken to the headquarters of the Bureau of Customs in Manhattan. A thorough search revealed the car to contain 169 bags of heroin. The bags were so secreted as not to be in view (A. 96, 110-114).

During the following few hours, Giacomazzo appears to have agreed to act as a double agent for the Government. One bag of heroin was left in the car; the remaining 168 bags were replaced by bags of flour (A. 96-97). Thereafter, under surveillance by government agents, Giacomazzo drove the car off and went to his home located at 35-68 33rd Street in Astoria, Queens. He parked the car and went into his home. At 7:10 P.M. an agent observed D'Aloisio "approach the car slowly, look inside the car, walk around

* It was later established that the couple had traveled with the car to Italy on July 24, on board the S.S. Michelangelo (A. 71-82, 140).

the car [and] look over at the residence where Mr. Giacomazzo had entered. Then he [D'Aloisio] continued on north on 33rd Street towards Astoria Boulevard" (A. 188-190). Shortly thereafter, D'Aloisio was again observed to have walked past the Ford and then into his own home at 25-15 34th Street (A. 117-119).

At about 7:30 P.M., Giacomazzo was seen to enter the Ford and he drove around the immediate area for about an hour and a half. At one point, he parked, walked back a block or so, and encountered D'Aloisio standing on the corner. They spoke for a few minutes and then went to their respective homes (A. 116-125, 195-200).

At about 9:30 P.M., Giacomazzo exited his home and went to the corner of 35th Street and Astoria Boulevard. In about ten minutes, the petitioner made his first appearance in these events. The Pontiac Grand Prix which he was driving, stopped at a traffic light at the corner of 35th Street and Astoria Boulevard, and Giacomazzo walked over to it, and had a conversation with petitioner (A. 125-126, 201).

Petitioner was then observed to drive off in the Grand Prix and Giacomazzo was observed returning to the Ford, and then following Rappa. The drive ended at the Lindenview Shopping Center on Parsons Boulevard, between 25th Drive and Willetts Point Boulevard in Queens. Petitioner drove the Grand Prix into the parking area of the shopping center and was followed by Giacomazzo. Petitioner left his car and leaned into Giacomazzo's car briefly. Giacomazzo, thereafter, drove the car to another place in the parking lot, got out, held a conversation with petitioner in the middle of the parking lot, and then went into a Chinese restaurant. Petitioner departed for his own home. Ten minutes after his entry into the Chinese restaurant, Giacomazzo exited, was picked up by an agent, and driven home (A. 125-132, 178). The car remained, undisturbed, under surveillance until the evening of September 23 (A. 134-136, 310-313).

4. The Events of September 23, 1971

In the interim, Berdin and Michel appear to have made a little progress in their attempt to make contact with their connection. They took a taxi cab to 34th Street in Astoria, but were unable to locate the Ford, and lost their way. It was decided that the search would be made easier if they went back to Manhattan and rented a car, which they did. In an attempt to evade a possible surveillance, Berdin drove the car out to LaGuardia airport and then came back to pick up Michel. Upon reencountering Michel, Berdin describes their conversation as follows:

> ". . . He was happy he got somebody on the phone and he told me 'the car is out of the boat but we think the police is watching us' so, at that moment, I said to him, I said, 'tell to your friend leave everything and go because, you know, I know when the police pass a car with the stuff, it's to take everybody after' so he said, 'I spoke with my contact and he say we are going to try to take it' and I tell him, I said to him, 'don't do it and . . . he said, 'I am going to call you tomorrow afternoon and if I tell you . . . I have . . . [a] . . . toothache—it will, it means it's finished; we are arrested or something happened'" (A. 659-660).

Michel developed his toothache, and it was thus that the involvement of Berdin and Michel in these events terminated. Berdin was arrested on the morning of September 26th (A. 660-661).

At about 7:30 P.M. on September 23, 1971, an agent driving a taxi cab picked up Giacomazzo at his home. They had a discussion until about 11 P.M. and then the agent drove Giacomazzo to the shopping center at which the Ford was parked. Giacomazzo entered the Ford and drove to the Grand Central Motor Inn on 71st Street and Astoria

Boulevard and parked it in the parking lot of the Motor Inn. He then exited the car, and the gent drove him home (A. 134-136). The Ford, under surveillance, remained undisturbed until the afternoon of the following day (A. 478-479).

5. The Events of September 24, 1971

At about 1 P.M. on September 24, Giacomazzo arrived at the motel, entered the Ford, drove for a while and ended up at a small shopping center located at Broadway and 21st Street in Astoria. He parked the car and went into a diner at about 1:30 P.M. At about 2:20 P.M., petitioner and D'Aloisio were seen together by the side of the diner. They parted and petitioner was seen entering a Buick. Giacomazzo exited the diner, entered the Ford and drove off. The Buick followed the Ford (A. 208-212, 319-320, 577-590).

The two cars made their way to the Long Island Expressway and eventually proceeded to a rest area near Exit 51. Petitioner and Giacomazzo exited their respective cars and spoke to each other. Then Petitioner went to a public telephone in the rest area. An agent, who arrived at the scene at about the same time, thereupon approached petitioner and asked him for change of a quarter. According to the testimony of the agent, petitioner:

> ". . . looked through his pockets and he said he didn't have change of a quarter, and I said thank you.
>
> "I stayed facing the phone booth as he turned around and dialed the number, and he said, 'I am in Long Island. I am leaving now.'
>
> "At this point I turned around and left" (A. 324).

The agent claimed that he saw the last six digits dialed by petitioner, which were "982244". Standing about ten

feet away, the agent then saw petitioner leave the phone booth, and:

> ". . . he went back to talk, to Mr. Giacomazzo. At that point, Mr. Giacomazzo got into the Buick and Mr. Rappa got into the Ford, and started it, backed out—the front of the car was to the curb—backed out: at this time I was walking right to the Ford, and as I saw him put it in drive, as the car started to move, I arrested him" (A. 325).

A search of petitioner's pockets revealed a business card with what were, apparently, telephone numbers written on the back (Exhibit 19), the registration for the 1971 Buick, which petitioner had been observed driving during the course of the surveillance (Exhibit 20), the registration for a pontiac which was registered to petitioner (Exhibit 21), and a portion of the registration for the Ford (Exhibit 18) (A. 325-329).

6. The Testimony of Petitioner

Petitioner is twenty-nine years of age, is married, has three children, and a fourth child is expected shortly. He has resided in the United States for eleven years and lives in the house of his father-in-law in Flushing. He has never been convicted of any crime. For the first ten years of his residence here, he was a construction worker. A few months before the events of this case, he purchased a pizzeria and that has been his employment since that time (A. 715-717).

In his testimony, he unequivocally denied any knowledge concerning the presence of heroin in the Ford car and denied any complicity in the crimes charged (A. 732). He explained his activities on the days in question as follows: He has known Giacomazzo since they come from the same town in Italy. He denied seeing Giacomazzo on September 22nd and denied being in the vicinity of Astoria Boulevard on that date (A. 718-719).

The shopping center on Parsons Boulevard is near where he lives in Flushing. He denied meeting or talking with Giacomazzo at that shopping center. He explained his activities on September 22nd as follows:

> "Well, I was home about 12:00, 1:00. Then I went out. * * * I went out shopping. I came back home about, it was about 8:00 and, a car was parked in front of my father-in-law's garage and I parked my Grand Prix to the shopping center. * * * Yes in the Lindenview shopping center.
>
> "I left my car there and I walked home. Then about, stay home until about 10:30, 11:00, I believe, and then I came out about 11. I went to Main Street, buy a newspaper and go back right home. That's it" (A. 721-722).

He further denied meeting Giacomazzo or D'Aloisio on September 23rd. He knows D'Aloisio; their wives have been working together for years, and a cousin of Rappa's is married to D'Aloisio's sister-in-law (A. 723).

On September 24th, he went to his place of business at about 8 A.M. At about 11 A.M., he drove his Grand Prix to a warehouse in New Jersey which furnishes pizza supplies. Due to the fact that he had no spare tire and one of his front tires was "no good", he borrowed the Buick Electra of one of the persons who worked at the warehouse. His intention was to go to Long Island to purchase some tires, and he left his own car at the warehouse. He took the New Jersey turnpike, the George Washington bridge, and was on his way to the Triboro bridge, when the car he borrowed began emitting disturbing noises. At this point he was at 21st Street and Broadway and pulled into a diner parking area located there. After about ten minutes, D'Aloisio happened to come upon him in the parking area. They exchanged cordialities and then Rappa departed for the Long Island Expressway. At no time

up to this point had Rappa seen Giacomazzo. As he was nearing Exit 52 on the Long Island Expressway, the noises in the car started again and caused Rappa to become concerned. It is for that reason that he stopped at the rest area. While at the rest area, he went to make a telephone call, but kept getting a busy signal. It was then that someone came up to him and asked him for change. Then he tried to dial the number again, but again received a busy signal. It was at this point that Giacomazzo appeared (A. 724-728). He recounted the subsequent events as follows:

". . . He said hello to me. So I say, 'what are you doing over here?'

"He says, 'I took a walk to Long Island.' So I shake hands, and I say, 'how you been?' because it was long time that I no see him it was about six years that I no see him, and I used to see him a couple of times, about two years ago, because they have a feast in Astoria there, you know, the Virgin Mary, but I don't even—we no even say—we no even talk, nothing; it was about six years I no even talk to this guy.

"So I told him, I said, 'can you try to open please my hood of the car because I have been having trouble all the way through, you know, I heard a noise in front of the car.'

"And he tried to open the hood, and he couldn't open either.

"So he went inside my car and tried to open from inside the car and he couldn't open either. So he asked me—he told me, he says, 'what kind of trouble you got?' So I told him that I heard a noise and I was going to call the gasoline station to get somebody.

* * *

"He told me he says, 'if you want to use my car, since I have the time, I have a half hour, I can wait for you.' So I says, 'I appreciate very much. Thank you.'

"So I gave him my registration and he gave to me his registration—right? As soon as I got to his car and I put it in drive I see about ten guys pull on me and they say, 'you are under arrest'" (A. 728-730).

Petitioner explained that, when questioned by the agents, he had lied when he denied that he had seen D'Aloisio. The reason he lied was because he had been afraid and did not want to get involved (A. 782).

Reasons for Granting the Writ

The present case raises questions of substantial importance to the administration of justice in the Federal Courts. If a defendant may be woven into a narcotics conspiracy without any direct proof that he knew or should have known that his associates were engaged in narcotics traffic, then the standards of proof necessary to obtain a criminal conviction have been substantially relaxed. The increasing number of narcotics conspiracy prosecutions, as well as the current substantial social problem presented by narcotics, require that the lower Federal Courts be given authoritative guidance with respect to this evidentiary problem.

I.

It is of particular importance to note the following facts: (1) There was not a scintilla of testimony at this trial in which any witness claimed that the petitioner had any knowledge concerning the scheme to import narcotics or concerning the contents of the Ford; (2) the Government witness Berdin had no knowledge whatsoever concerning the petitioner; (3) the Government did not produce its informant, Giacomazzo, to testify as to the nature of any of his alleged meetings with petitioner; (4) the Gov-

ernment's whole case against petitioner was based solely upon his alleged proximity to the Ford on the occasions noted *supra,* his alleged, unheard conversations with D'Aloisio and Giacomazzo, his aborted entry into the Ford at the rest stop on the Long Island Expressway, and his denials of the allegations of various agents which placed him at brief meetings with D'Aloisio and Giacomazzo on September 22nd and 23rd.

We respectfully submit that the applicable law is stated in *Miller* v. *United States,* 382 F.2d 583 (9th Cir., 1967):

> "A conspiracy is a combination or agreement to violate the law, in this case an alleged scheme by two or more persons to import, receive, conceal or facilitate the importation or concealment of narcotic drugs. Since a conspiracy by its very nature is a clandestine offense, proof of the agreement must ordinarily rest upon inference drawn from competent circumstantial evidence. Diaz-Rosendo v. United States, 9th Cir., 357 F.2d 124, 129. The use of circumstantial evidence to support a conviction does not, however, relieve the prosecution from showing '*some* knowledge, explicit or implied, in each defendant of the principal purpose of the conspiracy, and *some* act or action indicating participation therein.' Chaves v. United States, 9th Cir., 275 F.2d 813, 817 (emphasis in original; bold added)" (382 F.2d at 586).
>
> * * * * *
>
> "In order to establish a person as a participant in a conspiracy, the evidence must show that the accused intended to join and cooperate in the illegal venture. Knowledge that a conspiracy exists is a minimum requirement for establishing the requisite intent. 'Furthermore, to establish the intent, the evidence of knowledge must be clear, not equivocal.'

> Direct Sales v. United States, 319 U.S. 703, 711. See Daly v. United States, 9th Cir., 282 F.2d 818, 821-822. Association with an alleged co-conspirator may raise strong suspicion of knowledge and intent, but this is not the only reasonable inference which may be drawn from such conduct. Evans v. United States, 9th Cir., 257 F.2d 121, 126; Ong Way Jong v. United States, 9th Cir., 245 F.2d 392, 394" (382 F.2d at 587).

Since there is not any evidence that the defendant Rappa was aware of the narcotic content of the car, the reasoning found in *United States* v. *Gallishaw,* 428 F.2d 760 (2nd Cir., 1970) is applicable. In *Gallishaw,* the defendant was charged with conspiracy to commit bank robbery. During its deliberations, the jury sent the following note to the trial Judge:

> "Does the supplying or renting of a gun, which is subsequently used in a bank robbery, constitute grounds for conspiracy if the person who rents the gun doesn't know how or where the gun will be used?"

The trial Judge responded that "if you find that the defendant rented the gun and understood and knew that there was a conspiracy to do *something* wrong and to use the gun to violate the law, you may find that he wilfully entered the conspiracy" (428 F.2d 762) [emphasis added].

Notwithstanding the fact that there was independent evidence of Gallishaw's own statements which, if believed, revealed knowledge of an intended bank robbery, the Court reversed, holding:

> "On this record, to convict Gallishaw for the substantive crime of aiding and abetting a violation of 18 U.S.C. § 2113(a), the government would have had

> to show at a minimum that he knew that a bank was to be robbed. To convict him of conspiracy, at the very least, no less was required. * * * [citations omitted] * * * Therefore, the charge here was fatally defective. * * *"

Precisely the same situation obtains in the present case. This record provides no indication of petitioner's knowledge as to the nature of any of the activities of D'Aloisio, Giacomazzo, Berdin or anyone else in the case. It is left to sheer speculation as to whether he thought criminal conduct was involved and as to whether he knew or should have known this conduct involved the importation or possession of heroin.

In this case, Giacomazzo, who was caught redhanded, had every reason to deliver up an innocent person to the authorities so as to get himself off the hook, both with respect to the authorities and with respect to whoever his true principals may have been.

In view of the dramatic, although inconclusive, aspects of the surveillance techniques and developments of this case, the following, often cited excerpt from the concurring opinion of Justice Jackson in *Krulewitch* v. *United States*, 336 U.S. 440 (1949), is quite applicable:

> "When the trial starts, the accused feels the full impact of the conspiracy strategy. Strictly the prosecution should first establish *prima facie* the conspiracy and identify the conspirators, after which evidence of acts and declarations of each in the course of its execution are admissible. As a practical matter, the accused often is confronted with a hodgepodge of acts and statements by others which he may never have authorized or intended or even known about, but which help to persuade the jury of the existence of the conspiracy itself. In other words, a con-

spiracy often is proved by evidence that is admissible only upon the assumption that the conspiracy existed. * * *

"A co-defendant in a conspiracy trial occupies an uneasy seat. There generally will be evidence of wrongdoing by somebody. It is difficult for the individual to make his own case stand on its own merits." (336 U.S. at 453-454)

The millstone of the admissions of others and the circumstances surrounding the activities of others was cast upon petitioner. It is clear, upon the facts of this case, that the government has attempted to secure a conviction based not upon evidence, but rather upon the sheerest speculation concerning, at most, equivocal facts. The government's case is grounded upon the dreaded concept of guilt by association.

In *Ingram* v. *United States,* 360 U.S. 672 (1959), this Court reaffirmed the proposition that:

"Without knowledge, the intent cannot exist. * * * Furthermore to establish an intent, the evidence of knowledge must be clear not equivocal. * * * This because charges of conspiracy are not to be made out by piling inference upon inference, thus fashioning * * * a dragnet to draw in all substantive crimes." (360 U.S. 680)

See also: *Glover* v. *United States,* 306 F.2d 594 (10th Cir., 1962); *Causey* v. *United States,* 352 F.2d 203 (5th Cir., 1965).

II.

The trial Court denied a defense motion to dismiss the prosecution at the end of the Government's case, and permitted the case to go to the jury. In its charge, to the jury, the Court gave standard instructions as to the requirement of proof beyond a reasonable doubt (A. 875-877), and as to the definition and significance of circumstantial evidence (A. 893-894). It then charged the jury as follows:

> "There are times when different inferences may be drawn from facts, whether they are proved by direct or by circumstantial evidence. At such times, the government asks you to draw one inference, while the defendants ask you to draw another. It is for you and you alone to determine what inferences you will draw" (A. 894).

Immediately after the Court's charge, the following colloquy took place between the Court and defense counsel:

> "[Defense counsel]: I respectfully except to your Honor's charge on circumstantial evidence and I respectfully ask that your Honor charge the jury that the inferences flowing from the circumstantial evidence must flow naturally and be consistent with guilt and be inconsistent with innocence and that then, where there are two inferences that can be drawn, one of innocence and one of guilt, the one of innocence should prevail.
>
> "The Court: Wait just a minute.
>
> "I gave a charge on inferences. There are times when different inferences may be drawn from facts. At such times, the government asks you to draw one set of inferences while the defendants ask you to draw another. It is for you to decide and you alone to decide what inferences you will draw.
>
> "[Defense counsel]: I understand that.

"The Court: I don't think I'll ask that.

"[Defense counsel]: I respectfully except. That's all I have, Judge" (A. 903-904).

We respectfully submit that in accord with the arguments already advanced *supra*, at pp. 15-19, it was error for the trial Judge not to charge the jury that ambiguous circumstances should be resolved in favor of the defendant. Without such a charge, the jury was free, particularly within the context of this case, to render a guilty verdict upon nothing more than speculation.

CONCLUSION

For all of the above reasons, the Petition for a writ of certiorari should be granted, the judgment of conviction should be reversed, and the indictment should be ordered dismissed; in the alternative, a new trial should be granted.

Respectfully submitted,

MAURICE EDELBAUM,
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October, 1972.

APPENDIX

Order of Affirmance

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the twenty-sixth day of September, one thousand nine hundred and seventy-two.

Present: HON. PAUL R. HAYS,
HON. JAMES L. OAKES,
HON. WILLIAM H. TIMBERS,
Circuit Judges.

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

—v.—

LORENZO D'ALOISIO, GUISEPPE GIACOMAZZO,
FRANK RAPPA,
Defendants,

LORENZO D'ALOISIO and FRANK RAPPA,
Defendants-Appellants.

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgments of said District Court be and they hereby are affirmed.

A. DANIEL FUSARO
Clerk

In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-643

FRANK RAPPA, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

After a jury trial in the United States District Court for the Southern District of New York, petitioner was convicted on two counts of conspiring to import and distribute heroin and importing heroin in violation of 21 U.S.C. 846, 963 (count one) and 21 U.S.C. 812, 951(a), 952(a), 960(a)(1) and 960(b)(1) (count two). On April 14, 1972, he was sentenced to concurrent fifteen-year terms of imprisonment on each count and a consecutive three-year special parole term on each count. The court of appeals affirmed without opinion (Pet. App.).

1. Petitioner contends that the evidence is insufficient to support his conviction.

The evidence showed that one Berdin arrived in New York in September, 1971, to arrange for the sale of 94½ kilos of heroin to be smuggled into this country concealed in a car (Tr. 586-594, 132-135, 251-252, 414-417, 596-598). On September 22, Berdin met his French co-conspirator, who told him the heroin would arrive in a beige Ford, license number 3T289 (Tr. 598-600, 634-636). They attempted unsuccessfully to telephone their New York contact, "Lorenzo" (Tr. 600-603).[1]

On the same morning, co-defendant Giacomazzo and his Ford, license number 3T289, arrived from Italy aboard the S.S. Raffaelo. The Ford was removed from the ship, placed on the pier and inspected by a Customs Patrol Officer, who found a half-kilo bag of heroin in a fender well of the car. Giacomazzo and his travelling companion were placed under arrest. The car was fully searched and a total of 169 bags of heroin, weighing approximately 82 kilograms, were found hidden in the automobile. The heroin was removed and 168 bags of flour and one bag of heroin were replaced in the Ford in the same locations where the heroin had been found (Tr. 20-30, 39-50, 384-387, 417-419).

Later the same day (September 22, 1971), Giacomazzo was released, and began working for the government. He drove the Ford, which remained under surveillance, to his home in the Astoria, Queens, section of New York City (Tr. 136-137, 419-421). A short time after Giacomazzo parked the car and went into his

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[1] Co-defendant D'Aloisio's first name is Lorenzo.

house, co-defendant D'Aloisio, who lived one block from Giacomazzo, appeared, walked around the car, and looked into it twice (Tr. 65-67, 135-141, 254-255). That same evening Giacomazzo drove the Ford aimlessly around the neighborhood while D'Aloisio observed it on foot. They conversed briefly twice. (Tr. 67-73, 109-112, 142-147, 255-258, 350-351). At about 9:30 p.m. Giacomazzo drove over to Astoria Boulevard and met petitioner; Giacomazzo went up to him and briefly bent over and looked into petitioner's car. Giacomazzo then returned to the Ford and followed petitioner to a shopping center in Queens, where they both parked near the entrance to the parking area. Petitioner left his car, walked to Giacomazzo, who had remained in the Ford, and bent over at the driver's side. Immediately thereafter Giacomazzo drove his Ford to another section of the shopping center and parked directly opposite petitioner's residence. Giacomazzo left the Ford and spoke to petitioner again. Both men then departed, petitioner to his home across the way and Giacomazzo to Astoria by cab (Tr. 73-82, 147-151, 258-260, 360-365, 422-424).

The Ford remained parked at the shopping center until 11:00 p.m. the next day, September 23rd, when Giacomazzo drove it to the Grand Central Motor Inn in Astoria, where he parked it and then returned home (Tr. 82-84, 151-152, 260-261, 375-377).

At approximately 1:00 p.m. on September 24, Giacomazzo returned to the Ford at the Grand Central Motor Inn and drove it to another shopping center in Astoria. He parked the car and entered a diner there. At approximately 2:30 p.m. petitioner and D'Aloisio

walked together along Broadway, stopped, and spoke momentarily. D'Aloisio then walked back toward the diner and petitioner walked into the parking area of the shopping center where he entered a Buick Electra. Petitioner drove the Buick around the block, parked on Broadway directly across from the diner and waited in the car. Approximately 20 minutes later D'Aloisio walked from the vicinity of the diner and shortly thereafter, Giacomazzo left the diner, entered his Ford and drove off. As the Ford left the shopping center, petitioner followed it in the Buick (Tr. 155-161, 261-268, 427-434, 525-537).

With petitioner following, Giacomazzo drove approximately 35 miles on the Long Island Expressway. Both cars left the Expressway at the same exit but then returned to it and continued eastward, now with petitioner's Buick in the lead. After driving for approximately one mile, petitioner and Giacomazzo both pulled into a rest area, parked their cars and spoke briefly to one another. Petitioner then walked to a telephone where he was approached by an agent, who asked him for change. After telling the agent that he had no change, petitioner dialed a number, the last six digits of which were 98-2244, and said to the party who answered, "I am in Long Island; I am leaving now" (Tr. 272). Petitioner then returned to Giacomazzo and spoke briefly to him; at that point he and Giacomazzo switched cars. Petitioner was arrested as he attempted to drive the Ford away (Tr. 269-273, 434-439).

Seized from petitioner when he was arrested were the vehicle registration for the Ford and a piece of

cardboard with four telephone numbers written on it, one of which proved to be a coded form of D'Aloisio's home telephone number. (Tr. 274-276, 392, 397-410).[2]

Following his arrest, petitioner told customs agents that he had borrowed the Buick from a friend in New Jersey because his own Pontiac had a flat tire and that he had driven to Long Island to buy tires. He claimed that he had heard a noise in the Buick while driving over the Triboro Bridge and in order to ascertain the cause of the noise he drove off the bridge to the vicinity of the Astoria shopping center—approximately 2 miles away from the bridge. He insisted that he did not meet anyone there and that he parked in the rest area on the Long Island Expressway only after hearing the same noise that he had heard while on the Triboro Bridge. He also claimed that it was only a coincidence that he met Giacomazzo, whom he had not seen in 6 years, at the rest area (Tr. 277-279, 296, 442-443, 462-466).

Petitioner, who testified in his own behalf, repeated and elaborated the story he had given after his arrest concerning his meeting with Giacomazzo at the rest area. He admitted knowing Giacomazzo and D'Aloisio but denied seeing Giacomazzo or being in Astoria on September 22, 1971. He also denied that he had seen

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[2] Records of the New York Telephone Company established that ten calls were made during June and July from D'Aloisio's home phone number to petitioner's business in New Jersey, including one on the day Giacomazzo purchased the Ford. Records of the New Jersey Bell Telephone Company established that one call was made from petitioner's business in New Jersey to D'Aloisio's number (Tr. 392-396, 464).

Giacomazzo at the shopping center in Astoria on the day of the arrest; that he followed his car to Long Island; that he left the expressway and then reentered; and that he knew that there was heroin in Giacomazzo's Ford (Tr. 663-667, 671, 676, 712).

2. Petitioner's contention that the evidence was insufficient to establish his membership in the conspiracy and to establish his knowledge of its purpose is without merit. It is settled that participation in a criminal conspiracy may be established by circumstantial as well as direct evidence (*Delli Paoli* v. *United States*, 352 U.S. 232, 236 n. 4), and that direct or circumstantial evidence may justify an inference that a particular defendant had knowledge of the narcotics' illegal importation (*Mason* v. *United States*, 383 F. 2d 107 (C.A. 10)). As both courts below found, the evidence was sufficient for the jury to find that petitioner was a knowing participant in the conspiracy. Petitioner's repeated meetings under suggestive circumstances and his telephone conversations with D'Aloisio and Giacomazzo, and the exchange of automobiles, were sufficient to establish his involvement in the illegal endeavor.

Petitioner also contends that he was entitled to have the jury charged that where two inferences can be drawn, one of guilt and one of innocence, the one of innocence should prevail. This contention is also without merit. The jury here was properly charged as to the standards for reasonable doubt (Tr. 821-823) and such an additional instruction was not necessary. *Holland* v. *United States*, 348 U.S. 121, 139-140.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

DECEMBER 1972.

☆ U.S. Government Printing Office: 1972—490-474/373